
U.S. Department of Labor
Office of Administrative Law Judges
525 Vine Street, Suite 900
Cincinnati, OH 45202

DATE ISSUED: January 29, 1998

CASE NO: 97-ERA-32

In the Matter of

BILLIE W. CHILDERS, JR.,
Complainant,

v.

CAROLINA POWER & LIGHT COMPANY,
Respondent.

APPEARANCES:

Billie W. Childers, Jr, *pro se*
116 Broadway Street
Seaman, OH 45679
Complainant

Douglas E. Levanway, Esquire
Chad M. Knight, Esquire (On brief)
Wise Carter Child & Caraway
P.O. Box 651
Jackson, MS 39205
For the respondent

BEFORE: DONALD W. MOSSER
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This matter arises under the Energy Reorganization Act [ERA], 42 U.S.C. § 5851, and the regulations at Title 29 of the Code of Federal Regulations, Parts 18 and 24. The ERA grants protection to employees in the nuclear power industry from employment

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discrimination resulting from commencing, testifying at, or participating in proceedings or other actions to carry out the purposes of the ERA or the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2011 *et seq*.

Mr. Billie Childers filed a complaint under the ERA on January 6, 1997. After an investigation, the Wage and Hour Division of the Employment Standards Administration of the Department of Labor concluded that Mr. Childers had been terminated due to his job performance, and not as the result of unlawful discrimination prohibited by the ERA. Mr. Childers then timely requested a hearing before the Office of Administrative Law Judges. The hearing was held in Wilmington, North Carolina, on July 21 and 22, 1997. The parties were afforded the opportunity to submit post-hearing briefs since they agreed to waive the statutory time constraints.

ISSUES

The principal questions presented in this case are: (1) whether Mr. Childers engaged in activity protected under the ERA; and, if so, (2) whether the respondent discriminated against him because of that activity.

FINDINGS OF FACT[1]

1. Complainant, Billie Childers, was employed by Carolina Power & Light Company (CP &L) at its Brunswick Nuclear Plant at Southport, North Carolina on February 7, 1994, as a health physics technician. (ALJX 12).

2. The basic duties and skills of a health physics technician [hereinafter technician] include briefing workers about the radiological conditions in the areas of the plant in which they would be working, and performing radiation surveys and "smears" to test and determine these conditions. In addition, technicians control access to areas posing threats to workers due to high radiation. Depending on the radiological conditions in certain areas, these technicians also oversee the workers to ensure that work is accomplished as safely as possible. They are responsible for ensuring the safety guidelines for particular job assignments are not exceeded. (CX 16-g; Tr. 132-33, 134, 138).

3. Mr. Childers received commendations for raising safety concerns at various times during his tenure with CP&L . (CX 13; Tr. 249-50).

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4. On February 11, 1996, the complainant received an evaluation from his immediate supervisor that resulted in an overall evaluation of "meets expectations" but also included some items for which Mr. Childers was graded as "needs improvement." (RX 4; Tr. 93-94).

5. Mr. Childers signed the evaluation, but later protested some of the individual items of the evaluation. The matters challenged by Mr. Childers related to his personal integrity, and not the safety of the plant. (Tr. 213, 215).

6. Upon being presented with evidence of the truth of Mr. Childers' assertions, the complainant's supervisor replaced the original evaluation with an updated evaluation, in which he changed some of the disputed individual items, but maintained the overall "meets expectations" standard. (RX 5).

7. There was a change of superintendents of CP&L's radiation protection department in October of 1995. The new superintendent [hereinafter sometimes referred to as CP&L's superintendent] instituted a reorganization of the radioactive protective department. As a result, ninety to ninety-five percent of the work assignments of the technicians and their supervisors were changed. (Tr. 263-64).

8. Mr. Childers' supervisor was changed because of the reorganization without input from the complainant's previous supervisor. (Tr. 265, 303, 305).

9. At the time the decision was made to reassign the complainant, the complainant's new supervisor was not aware that Mr. Childers had challenged the evaluation by his previous supervisor. However, CP&L's superintendent was aware of the evaluation when he approved the reassignment. (CX 20; Tr. 267, 305).

10. Complainant's new supervisor assigned Mr. Childers to work with a maintenance team that operated on the refuel floor. (Tr. 304-6).

11. Mr. Childers had never been assigned to the refuel floor on a full time basis, but had performed some individual assignments there while working in other areas of the plant. His work history at other nuclear power plants had not involved full time work on a refuel floor. (Tr. 92, 97, 176, 305).

12. The work on the refuel floor was more hectic than some other work to which Mr. Childers could have been assigned, but involved the basic skills that any technician was expected to possess, with the exception of some of the work involving the spent fuel casks. (Tr. 49, 266, 318, 324).

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13. Mr. Childers did not believe that he was qualified to do work on the spent fuel casks on the refuel floor and told the refuel floor supervisor of his concern. This supervisor

indicated that this would not pose a problem. Mr. Childers' newly assigned immediate supervisor had recognized in assigning Mr. Childers to the refuel floor that he was not qualified to perform some of the work involving the spent fuel cask. She therefore assigned other technicians to assist him in performing these tasks. Mr. Childers did become qualified for the spent fuel cask work in April of 1996. (Tr. 101, 174, 201-202, 266-70, 295, 299, 306, 314-15, 324, 350).

14. After being posted to the refuel floor, Mr. Childers became concerned that planning and scheduling problems were leading to unsafe conditions. He discussed his concerns with the floor supervisor for that week. This supervisor prepared two condition reports a written complaint of a problem that needs to be corrected showing these problems. (Tr. 100, 203, 206-7, 215-16, 251).

15. The condition reports contain no indication of Mr. Childers' involvement and the reporting supervisor did not mention Mr. Childers when discussing the reports with CP&L management. Mr. Childers' immediate superiors were not aware of the complainant's involvement in the reports until after Mr. Childers' terminated his employment with CP&L. (Tr. 203, 206-7, 252, 269, 306, 314-15, 354).

16. In June of 1996, during one of the regular morning meetings held at the plant, Mr. Childers raised concerns about his radiation exposure with another supervisor at the plant. Mr. Childers expressed concern that his dose was higher than that of the other technicians, although still within CP&L and Nuclear Regulatory Commission guidelines. Mr. Childers did not raise this concern with his immediate supervisor or with any of the supervisors with whom he worked. (Tr. 224, 253-54).

17. On the morning of July 8, 1996, Mr. Childers attended the morning meeting of the maintenance crew to which he was assigned. Several jobs were scheduled for that day, including replacement of a ladder in the equipment pool. Mr. Childers briefed the maintenance crew on what they needed to do to protect themselves from the radiological conditions on two of the jobs, but not for the ladder job. He did not brief them regarding the radiological aspects on the ladder work because he did not believe he had enough people to assist him on that job. (Tr. 135-38, 143).

18. Mr. Childers went to the refuel floor supervisor after the morning meeting and requested that another technician be assigned to assist him that day, but the complainant did not tell that supervisor of the proposed ladder work. Another health physics technician was then assigned to help Mr. Childers on the refuel floor. (Tr. 140-142).

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19. While the other technician assisting the complainant was performing some of his work, Mr. Childers took a break, leaving the technician with the maintenance crew. During the complainant's break, the crew finished the tasks they were working on and moved to the equipment pool room to start the ladder replacement job. The other

technician did not brief the maintenance crew on the radiological requirements of this job and did not know that the crew had not been briefed about these matters by Mr. Childers during the morning meeting. (Tr. 105, 142-43).

20. The equipment pool is where spent fuel water from the spent fuel pool of the nuclear reactor is stored. The pool has stainless steel walls and its approximate dimensions are 40 feet deep, 50 feet long and 25 to 30 feet wide. Equipment which is taken out of the spent fuel pool is stored in the equipment pool because the water in this pool helps to keep down the radiation levels of the equipment which is contaminated. The radiation levels of the equipment pool obviously vary but it is generally considered to be highly radioactive. The water had been drained from the equipment pool on the date the maintenance crew was to replace the ladder, but the radiological conditions of the pool were high because it had not been decontaminated. (Tr. 155-163).

21. Neither Mr. Childers nor the other technician had surveyed the equipment pool to ascertain its radiation and contamination levels. The other technician did survey the equipment pool ladder, but he did not know that the portion of the ladder that he surveyed had already been wiped by the maintenance crew thereby reducing the radiation or contamination readings. (CX 10; Tr. 105-6, 139, 147).

22. When Mr. Childers returned from his break, he did not enter the equipment pool room because the other technician indicated that he was performing a survey on the ladder. Mr. Childers remained outside the room so he could run the survey test results. These results showed a contamination level that was significantly lower than the actual contamination of the ladder, but still two-and-a-half to four times above the safety threshold that had been established for that job. (Tr. 106-7, 142-43, 145-47, 150-51).

23. A health physics technician is required by plant procedure to immediately stop work on a job if a radiation level is reported to be above the safety threshold. Neither Mr. Childers nor the other technician remembered the safety threshold for the ladder job and therefore allowed that work to continue. (Tr. 134, 147-48, 150).

24. Under plant procedures, whenever an abrasive technique is to be used on a job, such as cutting or hammering, a health physics technician is required to conduct additional safety measures such as taking radiation samples of the air and determining if additional safety equipment is necessary. Notwithstanding, Mr. Childers and the other technician decided it was unnecessary to take an air sample or establish additional precautions when the maintenance crew asked permission to cut off a portion of the equipment pool ladder with a band saw. (CX 10, 16-d, 20; Tr. 152-155).

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25. The other technician left the equipment pool room before the maintenance crew began to reinstall the ladder, leaving Mr. Childers as the sole technician in the room. The ladder would not slide into place as designed, despite the maintenance crew's use of long

poles and levers to shove it. With permission from Mr. Childers, one of the crew members stood on the top of the ladder to see if the additional weight would cause the ladder to slide into place. This plan also failed. (CX 10; 107-8, 154-55).

26. In a further effort to shove the equipment pool ladder into place, a maintenance worker, with the permission of Mr. Childers, descended the ladder some fifteen feet into the equipment pool although Mr. Childers had not surveyed the radiation levels on the inside of the pool. This worker then, with the permission of Mr. Childers, used a rubber mallet, which also is considered an abrasive technique, to tap one of the prongs of the ladder into place. This technique proved successful and the worker descended the ladder to the bottom without the permission of Mr. Childers to knock the other prong of the ladder into place. (CX 20; RX 9; Tr. 109, 160-64).

27. When the maintenance crew left the equipment pool room and passed through the radiation monitors, several workers set off the radiation alarm. Mr. Childers successfully resolved the problems of all but two of the workers, whom he took to another monitor station. When both workers also set off that monitor, Mr. Childers attempted to decontaminate them on the spot, rather than take them to the decontamination station as required by plant procedure. The complainant then released the worker he believed had been successfully decontaminated, and escorted the other worker to the decontamination station. It was later ascertained that both workers had ingested radiation. (Tr. 110-13, 165-70).

28. Mr. Childers initially did not inform the refuel floor supervisor of his attempts to decontaminate the two workers, although required to do so under plant procedures. He later admitted those attempts. (Tr. 167, 170-72).

29. The work in the equipment pool room also resulted in the contamination of two other levels of the building, although this contamination was also partially caused by a faulty air flow pattern in the building. (CX 16-d; Tr. 102, 154, 172-73).

30. Mr. Childers' immediate supervisor recommended the complainant be disciplined after discussing the equipment pool incident with CP&L's superintendent and the manager of environmental and radiation control [E&RC]. It was determined by CP&L's superintendent that Mr. Childers' action regarding the equipment pool room violated the company's policies and procedures because Mr. Childers failed to take the proper survey, he let workers into an area with an unknown hazard, he failed to take a proper air sample, he failed to provide proper job coverage and he failed to communicate the radiological hazard involved in the jobs. (Tr. 114, 179, 269-70, 275, 277, 309).

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31. Mr. Childers was first suspended without pay from July 10 through July 12, 1996. On July 22, 1996, he also was assigned to complete a performance plan over the next 60

days to monitor his job performance which he was expected to improve. (RX 1; Tr. 114, 179, 308).

32. The Nuclear Regulatory Commission also investigated the equipment pool incident. The investigation lasted four days. On the last day of the investigation, the accident investigator was asked if he wished to interview Mr. Childers, but chose not to after he learned Mr. Childers was at home. Mr. Childers' superiors did not forbid the complainant from talking to the Nuclear Regulatory Commission investigator. (CX 20; Tr. 271-72, 357-58).

33. Mr. Childers' immediate supervisor prepared an appraisal of the complainant's job performance on September 19, 1996. She rated his performance as "needs improvement" and therefore kept Mr. Childers on the July 22, 1996 performance plan. Mr. Childers did not contest this evaluation. (RX 2; Tr. 180, 310-312).

34. On October 2, 1996, Mr. Childers was working with a maintenance crew that needed to perform some welding and then wrap a flush table in the Control Rod Drive [CRD] rebuild room in order to move that table to another area. He had surveyed that room on the previous day and had briefed the maintenance crew on the radiological conditions and safety precautions necessary in the wrapping and moving job. The maintenance crew leader told Mr. Childers on October 2 that the welding was to be performed that morning, so Mr. Childers resurveyed the room and found no change in radiological conditions from the previous day. He again briefed the crew on the welding job and it was performed. (CX 16-f; RX 23; Tr. 117, 121, 180-84).

35. In the afternoon of October 2, the crew leader paged Mr. Childers to ask permission to perform the wrapping job, which involved wrapping the table with a plastic or "Saran Wrap" like material to minimize any spread of contamination in moving the table to another area. Although he did not return to the CRD rebuild room at that time, Mr. Childers instructed the crew leader that the same workers who had been briefed on the welding job should perform the wrapping job and that the radiological conditions in the room had not changed. (CX 16-f; Tr. 118, 125, 184-85, 187-89).

36. The table that was to be wrapped in the CRD rebuild room had a rope around it, indicating that it was an area of high radiation. Only health physics technicians are authorized to remove such a rope. During his safety briefing, Mr. Childers had not given the maintenance crew any instructions on how to work with such a rope. The maintenance crew leader removed the rope without Mr. Childers' permission in order to wrap the table. The rope was not replaced. (CX 16-f, 16-g; Tr. 183-85, 189-91).

37. On being advised that the maintenance crew was to wrap the table in the CRD rebuild room, Mr. Childers did not proceed directly to the room, but became involved

in other tasks. When he returned to the area of the CRD rebuild room, he did not enter the room because the work crew was exiting and reported that they encountered no difficulties in wrapping the table. Mr. Childers did not enter the CRD rebuild room after the table was wrapped, so he did not see that the warning rope around the table had been removed. Mr. Childers also did not know at that time that the maintenance crew leader had used different workers to wrap the table than the ones who had been briefed by him. (CX 12, 16-f; Tr. 118, 121, 125-26, 188, 191-93, 197).

38. On the day following the pertinent work in the CRD rebuild room, a different technician entered the room and discovered the warning rope had been removed. He immediately reported this safety and procedural violation. An investigation was begun by CP&L personnel and it was determined that Mr. Childers had insufficiently briefed the work crew on the wrapping of the table because he did not mention how to wrap the table in the presence of the rope, nor did he visit the room during or after the performance of the work. (CX 12; Tr. 119, 121, 198).

39. An internal investigation of the CRD rebuild room incident was commenced on October 3, 1996 by the company's E&RC manager. I reiterate that this manager also was aware of the complainant's involvement in the incident in the equipment pool room on the refuel floor and had concurred in the disciplinary action taken at that time. He interviewed Mr. Childers on October 4, 1996, as well as the other workers involved in the incident. (CX 12, 16f; Tr. 119, 122).

40. CP&L's superintendent also held a meeting with four of the five supervisors involved with Mr. Childers on both the June and October, 1996 incidents. Complainant's previous supervisor, the one who prepared the evaluation in February of that year that the complainant protested, was not available to attend this meeting. The supervisors unanimously agreed to recommend that Mr. Childers be terminated because of the second serious incident within a short period of time. CP&L's superintendent determined that Mr. Childers violated company policy and procedures with respect to the October 2, 1996 incident because he failed to adequately brief workers of the radiological hazards, failed to provide job coverage and failed to properly survey the radiological conditions. (Tr. 270, 273, 312-313).

41. On October 8, Mr. Childers contacted the Nuclear Regulatory Commission to discuss possible safety violations. At that time, he did not tell anybody at CP&L of his call. (Tr. 122, 198-99, 248, 314).

42. The E&RC manager, with the advice of the complainant's immediate supervisor and CP&L's superintendent, decided to terminate Mr. Childers for the safety errors made in the CRD rebuild room, which were consistent with the prior errors made in the equipment pool room. (Tr. 123, 127, 270, 273-74, 361-62).

43. On October 9, Mr. Childers was called and told to report to CP&L's plant. When he arrived, the E&RC manager gave the complainant the choice of termination or resignation, noting that a resignation would look better on the complainant's resume. Mr. Childers chose to resign. At the time of Mr. Childers' resignation, neither his immediate supervisor, CP&L's superintendent nor the E&RC manager knew of Mr. Childers' contact with the Nuclear Regulatory Commission. (CX 12; Tr. 123, 198-99, 276, 287, 362).

44. After his resignation, Mr. Childers participated in an exit interview and filled out an exit questionnaire. In both the interview and questionnaire, he stated that he had safety concerns regarding the plant, but that he had not reported them through normal channels, but only to a refuel floor supervisor, who independently prepared condition reports regarding these matters. (RX 43; Tr. 215-16).

45. Mr. Childers also subsequently complained that some of CP&L's radiation control technicians were not qualified to work on spent fuel casks on the refuel floor. (Tr. 22, 219-20).

46. The maintenance crew leader who removed the rope from around the table in the CRD rebuild room during the October 2, 1996 incident was disciplined by CP&L but was not terminated because this was his first documented violation. (Tr. 275, 277).

CONCLUSIONS OF LAW

My jurisdiction is limited in this case. By law, I can only decide whether Mr. Childers was discriminated against because he was engaged in protected activity under the Energy Reorganization Act. I do not have the power to decide if he was wrongfully terminated for some other reason, if he was assigned to a particular job as retaliation for other actions he took, or if CP&L's procedures need improvement. Those issues must be addressed in other forums.

In order to succeed in those matters over which I do have jurisdiction, Mr. Childers, like all complainants under the ERA, must first make out a *prima facie* case of discrimination by showing that he engaged in protected activity which motivated the employer to take adverse employment action. The employer then has the opportunity to rebut this finding by producing evidence that the adverse action was motivated by a legitimate, nondiscriminatory reason. However, the burden of proof of discrimination stays with the complainant. Therefore, if CP&L establishes rebuttal, Mr. Childers must then show that the reasons offered by CP&L are not the true reason for the adverse action, either by showing that the discriminatory reason more likely motivated the company or by showing that the company's explanation is not credible. *Shusterman v. Ebasco Servs., Inc.,* 87-ERA-27 @ 4 (Sec'y Jan. 6, 1992); *Larry v. Detroit Edison Co.,* 86-ERA- 32 @ 4 (Sec'y June 28, 1991).[2]

I note that Mr. Childers proceeded *pro se*, as he was unable to obtain an attorney. (Tr. 5-6). I found that he was more than capable of representing himself, and did so admirably. However, he is entitled to some adjudicative latitude because of his *pro se* status. *Saporito v. Florida Power & Light Co.,* 94-ERA-35 @ 6 (ARB July 19, 1996). Notwithstanding, he still must establish a set of facts which, if proven, would support his claim of entitlement to relief. *Grizzard v. Tennessee Valley Authority,* 90-ERA-52 at n.4 (Sec'y Sept. 26, 1991). To do so, he must prove the following elements:

1. that he was an employee of a covered employer;
2. that he engaged in protected activity;
3. that he thereafter was subjected to adverse action regarding his employment;
4. that CP&L knew of the protected activity when it took the adverse action; and
5. that the protected activity was the reason for the adverse action.

Saporito v. Florida Power & Light Co., 94-ERA-35 @ 3-4 (ARB July 19, 1996) (citing *Simon v. Simmons Foods, Inc.,* 49 F.3d 386, 389 (8th Cir. 1995); *Mackowiak v. University Nuclear Systems, Inc.,* 735 F.2d 1159, 1162 (9th Cir. 1984); *Carroll v. Bechtel Power Corp.,* Case No. 91-ERA-46 , slip op. at 11 n.9 (Sec'y Feb. 15, 1995), *aff'd sub nom., Carroll v. United States Dept. of Labor,* 78 F.3d 352, 356 (8th Cir. 1996)). The first element is uncontested. The same is not true of the remaining elements.

Mr. Childers claims the first protected activity he engaged in consisted of challenging his personnel evaluation by his first supervisor, leading to a retaliatory assignment to a position as lead technician on the refuel floor for which he was not qualified, which in turn inevitably lead to errors on his part, thus providing CP&L with an excuse to terminate him. (Tr. 213). However, he admitted that the issues he raised with this supervisor revolved around personal integrity, not nuclear safety. (Tr. 213). Issues of personal integrity do not fall under the protection of the ERA, as they do not involve alleged violations of the Atomic Energy Act of 1954 or the purposes of that act. 42 U.S.C. § 5851. Therefore, his challenge of his supervisor's evaluation is not a protected activity under the ERA. Furthermore, even if it could be concluded that this was protected activity, the assignment to the refuel floor was made before his new supervisor and the person who made the reassignment were aware of his challenge to the evaluation. This negates the knowledge element Mr. Childers must prove. Thus, Mr. Childers has not established a *prima facie* case on the basis of the challenged evaluation.

The complainant testified about other activities which might be classified as protected activity. The first of these involves two condition reports that he was involved in generating. These reports, which can be construed as internal safety complaints, might be classified as protected activity. *See Passaic Valley Sewerage Commissioners v. United States Dept. of Labor,* 992 F.2d 474 (3rd Cir. 1993); *Jones v. Tennessee Valley Authority,* 1991 US App LEXIS 25777 (6th Cir. 1991); *Kansas Gas & Elec. Co. v. Brock,* 780 F.2d

1505 (10th Cir. 1985), *cert. denied,* 478 U.S. 1011 (1986); *Bechtel Construction Co. v. Secretary of Labor,* No. 94-4067, 1995 U.S. App. LEXIS 9029 (11th Cir. Apr. 20, 1995). *But see Brown & Root, Inc. v. Donovan,* 747 F.2d 1029 (5th Cir. 1984). Assuming *arguendo* that the reports qualify as protected activity, Mr. Childers still is unclear about what adverse action CP&L took against him, as these reports were generated *after* he had been transferred to the refuel floor. Moreover, Mr. Childers offered no evidence that CP&L management was aware of his involvement in these condition reports at the time his employment with this company ended. His supervisors testified that they were unaware of his involvement, and his name appears nowhere on the condition reports. Furthermore, Mr. Childers testified that the person to whom he reported the safety concerns probably took credit for the reports, and did not disclose Mr. Childers' involvement. Thus, Mr. Childers has not shown the fourth element: that CP&L knew of this purported protected activity when the company took an adverse action including his forced resignation. Thus, he has not made a *prima facie* case of discrimination based on the condition reports.

The complainant contacted the Nuclear Regulatory Commission on October 8, 1996, the day before his employment with CP&L ended. While contacting the NRC regarding nuclear safety concerns clearly qualifies as protected activity, once again the evidence shows that CP&L did not know about this before Mr. Childers' resignation. Mr. Childers himself testified that he did not tell anyone at CP&L before his resignation. (Tr. 198-99). Thus, as with the condition reports, CP&L had no knowledge of this protected activity, and it has not be shown that CP&L discriminated against Mr. Childers as the result of this activity. *See Bailey v. System Energy Resources, Inc.,* 89-ERA-31 @ 3 (Sec'y July 16, 1993); *Varnadore v. Oak Ridge National Laboratory,* 92-CAA-2 and 5 and 93-CAA-1 @ 46 (Sec'y Jan. 26, 1996).

Mr. Childers testified that he complained to management about the qualifications of employees handling the shipment of spent fuel casks. However, his complaints regarding other technicians did not come until well after he left CP&L, and thus do not qualify as protected activity. Tr. 219-20; *See Kahn v. Commonwealth Edison Co.,* 92-ERA-58 @ n.2 (Sec'y Oct. 3, 1994) *aff'd sub nom Kahn v. U. S. Secretary of Labor,* 64 F.3d 271 (7th Cir. 1995); *Boyd v. ITI Movats,* 92-ERA-43 @ 2-3 (Sec'y June 7, 1994). To the extent that he complained about his own lack of qualifications, this occurred before he resigned. Mr. Childers testified that he told the refuel floor supervisor about his lack of qualifications. While CP&L produced testimony that Mr. Childers' immediate supervisor, CP&L's superintendent and the E&RC manager did not know about these complaints, the company did not produce evidence that the refuel floor supervisor with whom Mr. Childers sometimes worked did not know. As this person served as one of the complainant's supervisors at the plant, Mr. Childers' complaints to him must be considered internal complaints, which are sufficient to invoke the protection of the ERA. CP&L is deemed to have been aware of this activity by virtue of this supervisor's knowledge. Furthermore, this supervisor presumably took part in the meeting at which the supervisors unanimously recommended Mr. Childers be terminated.

Even after showing protected activity followed by adverse action, Mr. Childers still must show a connection between the activity and the adverse action. This connection may be implied if the two actions occurred relatively close together. *McDonald v. University of Missouri,* 90-ERA-59 (Sec'y Mar. 21, 1995). Mr. Childers did not say when he raised his concerns about his qualifications, but it must have occurred between when he was transferred to the refuel floor and when he became qualified. Although he did not testify as to when he was transferred to the refuel floor, he did testify that it was after he challenged his February 1996 evaluation. As he became qualified on the spent fuel casks in April 1996, his complaints must have taken place between February and April, 1996, six to eight months before his employment ended. Six months is a sufficiently short time span. *Mandreger v. The Detroit Edison Co.,* 88-ERA-17 @ 9 (Sec'y Mar. 30, 1994). Eight months may be, but also may be too long. *Seda v. Wheat Ridge Sanitation District,* 91-WPC- 1, 2 and 3 @ n.2 (Sec'y Sept. 13, 1994) (eight months too long in that case, arising under similar statute, but may be sufficient in other cases); *Carson v. Tyler Pipe Co.,* 93-WPC-11 @ 5 (Sec'y Mar. 24, 1995) (ten months may be sufficient). As Mr. Childers has no other evidence supporting a finding that his forced resignation was caused by his complaints regarding his qualifications, I find that the temporal connection is insufficient to create a presumption of causation. The fact that Mr. Childers' immediate supervisor testified that she recognized his lack of qualifications and provided other technicians to assist him until he became qualified, strengthens my finding because it shows CP&L recognized this concern and dealt with it in a non-discriminatory manner.

Finally, Mr. Childers complained to the supervisor on the refuel floor that his radiation dosage was higher than that of the other health physics technicians. Complaints regarding the amount of radiation dosage a worker is or may receive may be protected activity, even if the dosage complies within the Nuclear Regulatory Commission limits. *Blackburn v. Metric Constructors, Inc.,* 86-ERA-4 (Sec'y June 21, 1988). This, too, was a valid internal complaint, and took place four months before his employment ended. Four months is a sufficiently short period of time to presume that there was a casual link between the complaint and the forced resignation. *Crosier v. Portland General Electric Co.,* 91- ERA-2 @ 5-6 (Sec'y Jan. 5, 1994). The evidence also shows that after his complaint, Mr. Childers' dosage levels dropped, indicating that CP&L responded to the complaint in a non-discriminatory manner. However, the burden in putting forth the *prima facie* case is low, and I therefore find Mr. Childers has established a prima facie case of discrimination arising from his concerns regarding the amount of his radiation exposure. *See Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248 (1981)..

Establishing a *prima facie* case is only the first step, however. Once Mr. Childers establishes it, CP&L receives the opportunity to rebut it by showing it had a legitimate, nondiscriminatory reason for requiring his resignation. *Carroll v. Bechtel Power Corp.,* 91-ERA-46 @ 6 (Sec'y Feb. 15, 1995), *aff'd sub nom, Carroll v. U.S. Dept. of Labor,* 78 F.3d 352 (8th Cir. 1996). This showing must be by clear and convincing evidence. 42 U.S.C. § 5851(b)(3)(B).

In this case, CP&L submits that Mr. Childers' fundamental errors in the equipment pool and CRD rebuild room incidents were legitimate, non-discriminatory reasons for his termination. The testimony of the complainant's immediate supervisor shows that Mr. Childers realized that the first incident alone was enough to cause his termination. (Tr. 309-10). I find the evidence clearly and convincingly shows that Mr. Childers' mistakes involved matters so basic to his job performing routine surveys and briefings, ensuring proper radiological protection procedures were followed, and ensuring that workers did not exceed the maximum authorized radiation dose that CP&L was justified in terminating him for these incidents. *See Scott v. Alyeska Pipeline Service Co.,* 92-TSC-2 @ 6 (Sec'y July 25, 1995). I therefore conclude that Mr. Childers' potential whistleblowing activities did not affect CP&L's decision to terminate him, but rather that CP&L did so for the legitimate and non-discriminatory reasons given. Thus, I find that CP&L has rebutted the prima facie case Mr. Childers presented.

The burden now returns to Mr. Childers to show by a preponderance of the evidence that these reasons advanced by CP&L were pretextual. *Carroll*, 91-ERA-46 @ 6. He must demonstrate this by showing that discriminatory reasons more likely motivated the action or that the proffered explanation is unworthy of credence. *Texas Dept. of Comm. Affairs v. Burdine,* 450 U.S. 248, 256 (1981). Initially, I note that Mr. Childers admits he erred in the two incidents involved in this case. Therefore, he cannot, and does not, argue that CP&L's charges regarding these incidents are unworthy of credence. Rather, his argument is that he was assigned to the refuel floor the location in the plant where the errors took place with the knowledge that he was inexperienced in that area of the plant with the expectation that he would therefore err and thus give the company a legitimate excuse to end his employment. There are two problems with this argument. First, it assumes that the protected activity took place before the reassignment to the refuel floor. As the only possible protected activity involved in this case occurred after this reassignment, his assignment to the refuel floor could not possibly have been in retaliation for that activity as it had not occurred. Second, if this indeed was the plan of CP&L, then logic dictates that Mr. Childers should have been terminated after the first incident in the equipment pool since the evidence indicates Mr. Childers' failures regarding the radiological hazards of the assigned jobs would have justified his termination. Yet, he was allowed to continue his employment for another three months, then was terminated after committing other serious and fundamental errors involving the same hazards. As a result of these two factors, I find Mr. Childers' argument regarding pretext is unpersuasive. No other arguments regarding pretext were made or are ascertainable from the record. Thus, Mr. Childers' complaint must fail because he has not shown that discriminatory reasons more likely motivated CP&L in its decision to request his resignation or that CP&L's explanation does not deserve belief.

Before concluding, given that Mr. Childers was proceeding *pro se*, I feel I should address some of the specific items he raised in his Final Summary, which served as his post-hearing brief. First, Mr. Childers urged me to consider additional documentary

evidence that he attached to the brief, specifically, other drafts of the case study which he prepared as part of his performance plan after the equipment pool ladder incident. However, as I informed Mr. Childers during the hearing, I can only consider evidence that was introduced at the hearing. These documents were not introduced then, and thus they can play no factor in my decision. He also refers to his deposition testimony and information purportedly set forth in cassette tapes and a video. However, that evidence also was not admitted at the hearing, and therefore is not in the record.

Second, Mr. Childers complains that he was not permitted to subpoena witnesses for his case. He is correct. Administrative law judges are only permitted to issue subpoenas when authorized by statute. 5 U.S.C. § 556(c)(2). In this case, the applicable statute is the ERA, and it does not authorize the issuance of subpoenas. *See* 42 U.S.C. § 5851. Furthermore, the Secretary of Labor has indicated that the Department of Labor is not authorized to serve subpoenas in the absence of a specific statutory authorization. *See Malpass v. General Electric Co.,* 85-ERA-38 and 39 (Sec'y Mar. 1, 1994). While I agree with Mr. Childers that he and other claimants under the ERA are severely hampered by their inability to subpoena witnesses, especially in cases where the witness would be testifying against his or her current employer, I did not have the power to issue the subpoenas that Mr. Childers requested. Moreover, CP&L's counsel called several of the witnesses that Mr. Childers had requested and credibly represented that other employees of CP&L would be available to testify without a subpoena if they chose to do so. (Tr. 27-29).

In summary, Mr. Childers needed to prove that he engaged in protected activity, that CP&L knew that he engaged in this activity, and that as a result of his engagement in this activity CP&L arranged for some adverse action. He has not met these burdens. Rather, the evidence clearly shows CP&L had legitimate, non-discriminatory reasons for disciplining Billie Childers.

RECOMMENDED ORDER

For the above-stated reasons, IT IS HEREBY RECOMMENDED to the Secretary of Labor that the complaint of Billie W. Childers be dismissed.

DONALD W. MOSSER
Administrative Law Judge

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U. S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N. W., Washington, D. C. 20210. The Administrative Review Board has been delegated authority and assigned responsibility by the Secretary to issue final decisions in employee

protection cases adjudicated under the regulations at 29 C.F.R. Parts 24 and 1978. See 61 Fed. Reg. 19978 (1996).

[ENDNOTES]

[1]References to CX, RX and ALJX pertain to the exhibits of the claimant, the respondent, and the administrative law judge, respectively. Citations to Tr. refer to the pages of the transcript of the formal hearing.

[2]Page citations for administrative decisions are to the Office of Administrative Law Judges law library, found at the OALJ Internet site, www.oalj.dol.gov.